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No. 201,645-6

SUPREME COURT
OF THE STATE OF WASHINGTON

In re:

WILLIAM H. WAECHTER,
Attorney at Law (WSBA #20602)

BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Table of Cases

Washington Cases

Federal Cases

Codes, Rules and Regulations

A. INTRODUCTION

Attorney William Waechter, a personal injuries attorney, improperly handled the billing of clients and certain trust account matters for which he is remorseful. He has not challenged the Washington State Bar Association's Disciplinary Board ("Board") rulings in connection with these violations. He does challenge the Board's recommended sanction of disbarment.

Waechter has never been the subject of WSBA discipline prior to the events at issue here. In recommending disbarment, the WSBA Hearing Officer, whose findings of fact and conclusions of law were adopted in full by the Board, failed to properly apply this Court's disciplinary sanction protocol, deliberately choosing to ignore expert testimony on Waechter's emotional problems that mitigated the disbarment sanction recommendation.

Moreover, the Board adopted the WSBA Office of Disciplinary Counsel's ("ODC") grossly inflated charging decisions that supported the disbarment recommendation, in violation of Waechter's right to avoid double jeopardy.

This Court should suspend Waechter from the practice of law as a sanction, and condition his return to practice upon appropriate restrictions on his handling of financial matters in his practice.

B. ASSIGNMENTS OF ERROR

(1) Assignments of Error

1. The Board erred in making finding of fact number 9.

2. The Board erred in making finding of fact number 10.

3. The Board erred in making finding of fact number 11.

4. The Board erred in making finding of fact number 13.

5. The Board erred in making finding of fact number 14.

6. The Board erred in making finding of fact number 15.

7. The Board erred in making finding of fact number 16.

8. The Board erred in making finding of fact number 28.

9. The Board erred in making finding of fact number 32.

10. The Board erred in making finding of fact number 33.

11. The Board erred in making finding of fact number 34.

12. The Board erred in making finding of fact number 35.

13. The Board erred in making finding of fact number 36.

14. The Board erred in making finding of fact number 41.

15. The Board erred in making finding of fact number 42.

16. The Board erred in making finding of fact number 43.

17. The Board erred in making finding of fact number 45.

18. The Board erred in making finding of fact number 47.

19. The Board erred in making finding of fact number 56.

20. The Board erred in making finding of fact number 59.

21. The Board erred in making finding of fact number 62.

22. The Board erred in making finding of fact number 73.

23. The Board erred in making finding of fact number 76.

24. The Board erred in making finding of fact number 85.

25. The Board erred in making finding of fact number 94.

26. The Board erred in making finding of fact number 114.

27. The Board erred in making finding of fact number 115.

28. The Board erred in making finding of fact number 116.

29. The Board erred in making finding of fact number 121.

30. The Board erred in making finding of fact number 122.

31. The Board erred in making finding of fact number 123.

32. The Board erred in making finding of fact number 125.

33. The Board erred in making finding of fact number 126.

34. The Board erred in making finding of fact number 127.

35. The Board erred in making finding of fact number 129.

36. The Board erred in making finding of fact number 132.

37. The Board erred in making finding of fact number 133.

38. The Board erred in making finding of fact number 135.

39. The Board erred in making finding of fact number 136.

40. The Board erred in making finding of fact number 139.

41. The Board erred in making finding of fact number 140.

42. The Board erred in making finding of fact number 142.

43. The Board erred in making finding of fact number 143.

44. The Board erred in making finding of fact number 144.

45. The Board erred in making finding of fact number 145.

46. The Board erred in making finding of fact number 146.

47. The Board erred in making finding of fact number 148.

48. The Board erred in making finding of fact number 149.

49. The Board erred in making finding of fact number 150.

50. The Board erred in making finding of fact number 153.

51. The Board erred in making finding of fact number 154.

52. The Board erred in making finding of fact number 157.

53. The Board erred in entering conclusion of law number 19.

54. The Board erred in entering conclusion of law number 97.

55. The Board erred in entering conclusion of law number 100.

56. The Board erred in entering conclusion of law number 101.

57. The Board erred in entering conclusion of law number 159.

58. The Board erred in entering conclusion of law number 160.

59. The Board erred in entering conclusion of law number 162.

60. The Board erred in entering conclusion of law number 164.

61. The Board erred in entering conclusion of law number 165.

62. The Board erred in entering conclusion of law number 166.

63. The Board erred in entering conclusion of law number 167.

64. The Board erred in entering conclusion of law number 168.

65. The Board erred in entering conclusion of law number 169.

66. The Board erred in entering conclusion of law number 171.

67. The Board erred in entering conclusion of law number 172.

68. The Board erred in entering conclusion of law number 173.

69. The Board erred in entering conclusion of law number 174.

70. The Board erred in entering conclusion of law number 175.

71. The Board erred in entering conclusion of law number 176.

72. The Board erred in entering conclusion of law number 177.

73. The Board erred in entering conclusion of law number 178.

74. The Board erred in entering conclusion of law number 179.

75. The Board erred in entering conclusion of law number 180.

76. The Board erred in entering conclusion of law number 181.

77. The Board erred in entering conclusion of law number 183.

78. The Board erred in making recommendation number 184.

(2) Issues Relating to Assignments of Error

1. Where an attorney had significant personal or emotional problems described as involving compassion fatigue, and that diagnosis was supported by undisputed expert testimony, did the Board err in failing to treat such personal or emotional problems as a mitigating factor for purposes of the sanction to be

assessed against the attorney? (Assignments of Error Numbers 71-78)

2. Where the ODC charged an attorney multiple times for the same unit of prosecution, did the Board's sanction recommendation offend double jeopardy principles by improperly enhancing the attorney's degree of culpability? (Assignments of Error Number 78)

3. Where an attorney had no prior history of discipline against him and he engaged in improper billing practices, mishandling trust account matters, should the attorney be suspended rather than disbarred where the mitigating factors of the ABA Standards for Imposing Sanctions and this Court's attorney discipline protocol call for the lesser sanction? (Assignments of Error Numbers 1-78)

C. STATEMENT OF THE CASE[1]

(1) Waechter's Background and Context of the Misconduct

Waechter was admitted to practice in 1991. Other than the limited period of time during which these breaches occurred (January 2012 to March 2013), he had a blameless record. This includes passing a random audit in 2002-2003 when he was in a different practice situation and Agnew kept his books. Tr. 325-26. Testimony from well-regarded and highly experienced members of the bar, such as Simeon Osborn and George Kargiannis, support the conclusion that Waechter is of excellent

[1] Waechter has assigned error to the Board's findings of fact and conclusions of law that he acted knowingly, particularly in light of his argument below that he had significant personal and emotional problems, and his office financial transgressions were the result of negligence.

moral character and committed to his clients' wellbeing. Tr. 324, 327, 334-35, 358, 392-400, 408-14, 454.

Since his admission to practice, Waechter has primarily worked as a plaintiff personal injury attorney. Tr. 102, 325.[2] In 2010, he started his own firm as a solo practitioner. Except for a brief period in 2007 and 2008, Waechter had not previously acted as a sole practitioner, or had sole charge of the financial management and bookkeeping aspect of a law practice. From 2010 until November 2011, his bookkeeping was primarily handled by paralegal, Cydney Anderson, who made the bookkeeping entrees on a daily basis. Anderson had no prior experience with IOLTA accounts, however. Tr. 102, 328, 444-47. After she left, Waechter took over all the bookkeeping and financial management aspects of practice until May 2013 when his paralegal and former bookkeeper, Karmen Agnew, was hired and given the bookkeeping responsibilities. Tr. 102-06, 189-90, 323, 358-60, 378. It was during this interim period, January 2012 until March 2013, that the mismanagement and misconduct relative to Waechter's trust account occurred.

All of Waechter's bookkeeping was manual, and he did not utilize computerized Quickbooks until the bookkeeping problems came to light;

[2] In referencing the record here, Waechter has referenced the transcript and exhibits generated before the WSBA Hearing Officer. The transcript is referenced as "Tr."

Agnew took over the bookkeeping and worked with ODC Auditor Rita Swanson in sorting out Waechter's accounts that were in a state of disarray. *Id.*; Ex. A1, A2; Tr. 103. Waechter failed to maintain a checkbook register for his trust account which included entries for all transactions and a new trust account balance after each receipt, disbursement or transfer. Individual client ledgers were not maintained. Trust account records were not reconciled on a monthly basis. FF 104-06.

In addition, some of Waechter's other practices made it difficult to keep accounts straight. He failed to keep a running balance, sometimes calling the bank for it. Tr. 105. Waechter did not usually receive advance cost deposits from clients, so he would pay them costs from his own money and then recover costs from any settlement or award. With client consent, he would have holdbacks for straggling disbursements. Tr. 444. But without contemporaneous records, it was difficult to determine what funds should be ascribed to what client. He also failed to transfer the full amount of fees and costs out of the IOLTA account into his operating account on each and every occasion. Ex. A2. The result of the disarray of the accounting records was that after the fact neither Agnew nor the ODC auditor could never fully reconcile the trust account. The both of them were not able to definitively reconcile the six transfers referenced in Count 1 with a corresponding fee or expense, and a balance of approximately

$393 on January 1, 2012 cannot be attributed to any client. Ex. 153; Tr. 330-32.[3]

A further complicating factor was that Waechter was ignorant as to the law relating to who was entitled to "attorney fees" under cases like *Matsyuk v. State Farm Fire & Cas. Co.,* 173 Wn.2d 643, 272 P.3d 802 (2012), *Mahler v. Szucs,* 135 Wn.2d 398, 957 P.2d 632 (1998) and similar cases. Many plaintiff attorneys agree that these decisions are hard to follow. Tr. 389, 411-12. Waechter believed until August 2013 that when an insurer paid a pro rata share for attorney fees for plaintiff's counsel that led to a recovery that benefitted a subrogated insurer, that he, the lawyer whose work benefitted the insurer, and not his client, was entitled to that payment for attorney fees. Tr. 182-83, 186-88, 448-52, 478-79. His lack of understanding of the law was particularly significant when he received a check from the insurer in 2012 described as *Matsyuk* fees for the Shrosbree settlement, a case involving his nephew, that had occurred several years earlier. Waechter was wrong about his understanding. He admits that. Below, he did not seek to excuse his mistake, except to assert it was an honest one. As a result of his ill-founded belief, he delayed payments to clients that formed the basis of Count 8 against him.

[3] The significance of this for present purposes relates to Waechter's mental state as to whether he made any transfer knowingly or negligently for purposes of any sanction.

(2) Waechter's Personal and Emotional Problems

2012 was a devastating year for Waechter, a dedicated plaintiff lawyer devoted to the interests of his clients. Tr. 334-35, 358. He had to abandon a case shortly before two cases in 2012 that would devastate him financially and emotionally. Tr. 396-400, 454. In the spring of 2012, Waechter lost a medical malpractice case, *Majeski v. Falicov*. He badly wanted to win that case for his client, an AIDS patient who underwent a spinal operation which left him a partial quadriplegic. Tr. 396-400, 454-58, 512-13. His client refused to accept a negotiated settlement against Waechter's advice. Waechter stood by his client and went to trial. When the result was a defense verdict, Waechter felt depressed and defeated. He was haunted by thoughts of the totality of life now for his client, home alone in a wheelchair in a little house by Northgate Mall. Tr. 457-58. The result was Waechter became disengaged, and he started "going through the motions" and his attention to detail and his law practice waned. *Id.*

This was followed by another loss in a second medical malpractice trial in 2012 in *Anderson v. Hamon*. His client was a young man whose brain herniated leaving him blind and in pain after a local doctor failed to send him to the emergency room. Tr. 396-400, 460-62, 512-15. Waechter was profoundly affected by those defeats. He was haunted by his other

client home alone, blind, and in pain. Waechter "lost it" and "threw in the towel." Tr. 461-62.

Waechter's therapist, Rik Muroya, diagnosed Waechter as suffering from vicarious traumatization also known as compassion fatigue, a condition that can affect individuals who closely associate with primary victims of serious trauma. Tr. 501-03. Resulting symptoms include feelings of being jaded, disassociation, and avoidance behaviors. Tr. 503-08. Dr. Marta Miranda, a psychologist, conducted an evaluation of Waechter in November 2015. Ex. 175, 176; Tr. 507-26, Ex. 175, 176.[4] Dr. Miranda's assessment of Waechter's personality and its inter-relationship with his professional life placed in proper context what happened to Waechter during the period of misconduct. He cares deeply about his clients to the extent that at time he goes overboard and over-identifies with them. This adversely affected his judgment. Ex. 175 at 5-10; Tr. 513. Based upon her clinical interviews and testing, Dr. Miranda did testify that on a more probable than not basis, Waechter was suffering from major depression and compassion fatigue in 2012. Ex. 175 at 8; Tr.

[4] In addition to clinical interviews with Waechter and his therapist, she administered several clinical tests that include a validation feature, identifying particular personality traits and validity scales that identify when individuals may be lying, exaggerating, or misrepresenting responses. Waechter was within acceptable limits. Ex. 175 at 5; Tr. 509-12.

509-12, 515-16, 521-22, 524-26.[5] His depression and pessimism were increased by his sense of isolation as a solo practitioner and more likely than not adversely affected his judgment and decision-making process following the *Majeski* and *Anderson* cases. His dissociative conduct likely caused him to be careless when handling client payments and diligently recording transactions. *Id.*; Tr. 457, 472, 516-17. Dr. Miranda also believed on a more probable than not basis that as regards the transfers of money from the trust account that post-dated the *Majeski* trial, Waechter did not intentionally or knowingly take his client's money. *Id.*; Tr. 521-22.

The WSBA presented no countervailing expert testimony. The Hearing Officer, a retired distinguished defense lawyer who had practiced in a large firm, simply rejected Dr. Miranda's testimony out of hand as "speculative and not credible," and "incompetent and insufficient." CL 176, 177. The gist of the rejection of her testimony in its entirely was predicated entirely on the fact that she had not seen Waechter at the time of the misconduct. CL 177, 178. As a result, the Hearing Officer found there was no competent or sufficient evidence Waechter was suffering from a mental disability as a mitigating factor. CL 180. He then found no

[5] Dr. Miranda could not testify as to a definitive diagnosis because she did not have the opportunity to see Waechter in 2012 early 2013 when he was in the throes of the effects of his professional reversals.

mitigating factor or personal or emotional problems. CL 181. In doing so, he did not find Waechter did not have personal or emotional problems. Rather he found to the extent he did, they were "caused by adverse professional events such as losing litigated cases, the resulting financial setbacks, and his need for funds following his professional reversals." CL 181.

(3) The Misconduct and How the WSBA Charged It

The WSBA prosecuted Waechter for 15 separate counts relating to his trust account. Proving that Waechter's trust account did not meet required standards for record keeping, client ledgers, and reconciliation contained in RPC 1.15A(h)(6) and RPC 1.15B(a)(1)(v) and(a)(2) in Counts 9 through 11 was no problem since Waechter so stipulated. However, the remaining twelve counts are not really indicative of twelve separate courses of conduct of misconduct or any client injury. As discussed below, they reflect counts for which clients were paid in full and there was no injury. In other instances, multiple counts relate to one course or until of conduct, but conduct is broken down into small individual events so that multiple counts and RPC provisions are implicated.

(a) Transferring Unreconciled Sums from Trust: Count 1

During the period that he was without a bookkeeper, Waechter transferred the following sums from the trust account to his operating account at Commerce Bank: $100 on January 25, 2012; $1,500 on March 13, 2012; $200 on May 4, 2012; and $500 on March 12, 2013. Ex. A12 at 1, 5, 9, 48; Tr. 102, 189-90, 358-60, 378, 443, 454; FF 2-5, 8. In addition, he made two transfers from the trust account to his personal account with Union Bank which he used to pay client expenses: $3,000 on July 27, 2012 and $5,000 on August 10, 2012. Ex. A12 at 18, 25; Tr. 443; FF 6-7. These six transfers total $10,300 that neither Agnew nor Swanson were able to definitively reconcile with a corresponding fee or expense. The reconciliation also could not attribute a balance of approximately $393 at the beginning of January 2012. Tr. 108-11, 448. Although these transfers totaled $10,300, after the Bar-supervised reconciliation, Agnew informed Waechter there was a shortfall of $7,300 which he immediately deposited into trust on August 5, 2013. Ex. 145; Tr. 82, 95-96, 10. Thereafter, Agnew prepared checks for Waechter from trust to properly pay clients and other expenses. This included a checks from trust to his operating account for costs and client expenses for which it appeared he had not been reimbursed in the reconciliation. Ex. A34, A65, 121, 137, 142, 145, 147; Tr. 187, 193, 332, 336-37.

In charging Waechter's misconduct relative to the above transfers, the ODC charged improper conversion of client funds prohibited by RPC 1.15A(b). It also asserted the more general violation relating to dishonesty in RPC 8.4(c). In addition, the ODC added that Waechter had committed theft in violation of RCW 9A.56.010 *et seq.* constituting a violation of RCW 8.4(b). The Hearing Officer found all aspects Count 1 proven, including apparently the underlying criminal offense to the RPC 8.4(b) violation, by "a clear preponderance of the evidence." The Hearing Officer then used that finding of a criminal violation as a disbarment standard under *Standard* 5.11. CL 162.

(b) Tori Weisel Case

The WSBA charged a multiplicity of counts relative to the Tori Weisel case, although in actuality the difference between what Waechter received ($2,500) and what he was entitled to receive under his fee agreement ($2,392.50) was only $107.50. There is no dispute that eventually Weisel received more than if subrogation liens had been paid at the time of settlement.

Waechter represented Weisel for injuries sustained in a vehicle accident for a contingent fee of one third of the gross settlement. FF 20-21. She agreed to a settlement of the claim for $7,250, which was paid and deposited into Waechter's trust account on October 12, 2012. Ex.

A23; Tr. 125-26, 239-40; FF 22-23. There were two subrogated claimants, State Farm and Premera; both agreed after negotiation to reduce their subrogated interest to $1,500 and $1,000 respectively. Ex 132; Tr. 377-78. Waechter informed Weisel of this by email on October 29, 2012. Ex. A25. On November 2, 2012, without notice. Waechter transferred $2,000 from the trust account. Ex. A26. At the time, he intended to take a fee. Tr. 465. Waechter then went to trial in *Anderson*, discussed above, the loss of which devastated him. Tr. 461, 463. On December 12, 2012, he sent Weisel a follow-up email stating that he hoped to reduce the liens further but he would take no fee in her case, noting there was a small amount of costs. She could settle immediately or wait to see if there was any further reduction. Weisel agreed to wait. Ex. A29, A30; Tr. 131-32. On January 17, 2013, Waechter sent Weisel a settlement statement by email. It listed the gross receipt of $7,250, costs of $101.42, and subrogated liens of $2,500 ($1,500 State Farm and $1,000 Premera). The net to the client was $4,658.58. Ex. A31, A32; Tr. 134. Weisel approved the amount and Waechter issued a check to her for $4,658.58 on March 25, 2013. That is the exact amount the client was owed. Ex. A34; Tr. 241.[6]

[6] If liens were to be paid, Waechter would have been required to use the $2,000 he previously had advanced to himself when he was going to take a fee.

When the trust account was being reconciled, Agnew realized the costs were not paid and there was an additional $500 to be paid for Premera lien. She prepared a check for Waechter in August 2013 to the operating account for $601.42, with ODC's Swanson's knowledge. Ex. A34; Tr. 340-47. Unfortunately, the ball was dropped with the audit and the closing of the trust account with Commerce Bank, and the liens were not paid at that time. Waechter paid State Farm on October 22, 2014 when he received a request. Ex. A36; Tr. 133, 137-38, 464-65. In August 2013, Premera decided that none of medical payments related to the accident and settlement so it closed its file and waived its lien. However, it never gave Waechter notice of that. Tr. 137, 347-49, 379. Waechter and Agnew only discovered before hearing that Premera had not been paid. Upon learning this, Waechter paid the $1,000 to Weisel from his operating account. Ex. A37, 177, 178; Tr. 236-38, 347-50, 376-78.

Here, Weisel recovered *more* than what she was legally entitled to receive if Waechter had taken his agreed fee and the insurer liens were paid. Premera eventually waived its lien. State Farm was paid in full for what it said it was due. While Waechter may have benefitted from a small amount of money he received after waiving his fee and not paying the liens, he was out of pocket for the uncompensated costs.

From this set of facts, the ODC charged and prosecuted six separate counts of misconduct, involving twelve separate RPC provisions. The Hearing Officer found all of them, including a finding that Waechter had committed the criminal offense of theft by a clear preponderance of the evidence. FF 97.

(c) Karen Hustor Case

This is another instance of a client receiving more than what she was legally entitled to receive under her fee agreement with Waechter. Waechter represented Karen Hustor in a personal injury lawsuit and was entitled to a fee of one third of the gross settlement of $55,000. FF 50-52. Instead of basing the fee on the settlement amount, Waechter agreed to take his fee on $50,000, and then rounded it down to $16,665, for a total reduction of Hustor's fee of $1,668.15. Tr. 149-51; FF 53-54. Hustor signed a settlement statement that provided for the $16,665 fee, costs advanced of $506.25, a subrogation payment for Regence of $1,602.87, and a holdback of $500 for additional costs. Ex. A42, A43; Tr. 432; FF 54. Waechter paid Hustor the balance of $35,725.88 on February 9, 2012, and her balance of the holdback after additional costs were paid on May 25, 2012. Ex. A40. He paid his fee on February 10, 2012. FF 55. On June 5, 2012, Regence informed Waechter that it was reducing its subrogation claim by one-third for his fee. He paid the reduced

subrogation claim the following day in the amount of $1,067.87. Ex. A40, A44, A45; FF 56-57. Believing he was entitled to the fee, Waechter wrote himself a check for the reduced Regence amount of $535.62. Tr. 152-53. 182-83, 186-88, 448-52, 476-79; FF 58. Hustor was paid the $535.62 by Waechter after his mistake became known, although payment was delayed until prior to hearing. FF 62.

From this simple set of facts, the ODC charged Waechter with three counts of misconduct, implicating five RPC provisions, including Count 2 for converting funds, not providing an accurate accounting, Count 7, for apparently not providing a new accounting for the payment of $535.62 to him, and Count 8, not timely paying Hustor.

(d) DR Case

Waechter represented DR in a personal injury case for a one third contingent fee on gross recovery. FF 65-66. In February 2012, DR's case settled for $55,000. FF 67. Waechter prepared a settlement statement, approved by the client, for his fee of $18.331.50; it also listed $8.249.35 for medical subrogation liens. FF 69. Waechter paid DR the $23,163.38 was provided in the settlement sheet immediately. Ex. A51, A52; Tr. 162-63. After paying some additional costs, Waechter paid DR the additional holdback in May 2012. Ex. 116A, 119, 120; Tr. 163. The Department of Labor & Industries ("DOLI"), that held the subrogation lien, reduced its

lien to $4, 496.39. FF 70. Waechter paid DOLI its lien amount that October. FF 71. He paid the balance of $3,752.96 to DR on August 6, 2013. The reason for the delay was Waechter's mistaken belief he was entitled to the attorney fee money. Once he was disabused of his incorrect notion, the amount was paid immediately. Ex. A54, 121; Tr. 152-53, 182-83, 186-88, 448-53, 476-79.

From this set of facts, the ODC, charged Waechter with two counts of misconduct, Court 4 for failing to maintain client funds in trust, and Court 8 for failing to make timely payments.

(e) CR Case

This is another instance where the client was paid in full. Waechter represented CR in a personal injury case for a one third contingent fee on the gross recovery. In March 2013, the case settled for $11,000. FF 77-79. Waechter was entitled to a fee of $3,630, but he again reduced his fee, agreeing to take $2,000. FF 80. The balance remaining to CR after payment of costs was $8,796.14. However, Waechter failed to properly total the costs, so he initially issued a check to CR for $8,751.19 on April 8, 2013. FF 86. CR presented the check and there were insufficient funds to cover the check. Waechter then deposited $3,000 into his trust account to cover the shortage and DR was paid. FF 88. The overdraft triggered the audit that ultimately led to these proceedings, and

Count 4 relating to CR. However, the reconciliation process revealed that Waechter had failed to properly add costs so he paid an additional amount to CR of $44.43 in August 2013.

(f) TJ Case

Waechter represented TJ on a contingent basis in a personal injury case that settled for $40,000 in January 2013. Waechter timely paid TJ on February 13, 2013 in the sum of $38,238.21, and paid his own fees, costs, and liens. FF 89-91. This left a holdback of $1761,79 for additional costs. FF 92. Waechter paid TJ that balance on May 2, 2013 from personal funds. FF 95. TJ was paid in full. Since the trust account was under review and being reconciled when the payment was made, Waechter paid the remaining amount due from his personal funds. Ex. A72, 146, 147; Tr. 350-51. In August 2013, after Agnew reconciled the trust account, Waechter transferred this sum from the trust account to himself as reimbursement for the payment he had made to TJ from his personal funds. Ex. A34.

Because Waechter's trust account was not fully reconciled and accurate between February 13, 2013, when the initial payment was made to TJ and May 2, 2014 when the hold back was paid, the ODC charged Waechter with misconduct (Count 4) for failing to maintain client funds in trust.

(g) The Shrosbree Matter

John Shrosbree is Waechter's nephew. He had a troubled history as a juvenile and a history of substance abuse. Tr. 193-94, 257-58, 262-66, 287-88. On February 6, 2006, at age 18, he was involved in a serious single car motor vehicle accident. Tr. 194-96, 255, 267. His mother, Colleen Waechter, asked Waechter to make a claim. Although Johnnie had suffered serious injuries, it was a tough case to litigate. Tr. 300-01, 494. He had attended a party with the car's driver, and both were extremely intoxicated and impaired by illegal substances. Having gone with him, Johnnie ran a high risk of being barred from recovery or having any recovery seriously diminished because of contributory negligence. *Id.* Waechter agreed to take the case on and in January 2007 he filed suit against the driver and his mother, the owner of the car. Ex. A81; Tr. 171-72. The purpose of the lawsuit was to pay off substantial medical and rehabilitation expenses that Shrosbree's parents had incurred. Tr. 263-65. Waechter does not remember entering into a fee agreement with Shrosbree since he regarded this as a family matter. Shrosbree could not remember any fee agreement. Tr. 173-44, 196-97, 268, 467-68, 493-94.[7] On

[7] Waechter's former law firm found an unsigned power of attorney by Shrosbree granting a power of attorney to his mother to act on all aspects of the claim until June 1, 2008. Ex. A95; Tr. 210-12, 266. Colleen testified she signed the power of attorney in the form of the unsigned power at the start of the litigation. Shrosbree testified that he very likely signed one. Ex. A95; Tr. 266, 285-86. Waechter did not

January 25, 2008, Shrosbree's case went to mediation with Waechter, Shrosbree, and his late father in attendance. Ex. A86; Tr. 197-99, 254, 267-68.

At the time of the mediation, Shrosbree was back abusing drugs. Tr. 257-58, 263-66. It was a matter of common agreement among the family that Shrosbree should not personally receive any money because he would harm himself with it. Tr. 199. At mediation, the case settled for $90,000 and a waiver of a PIP lien. Ex A86; Tr. 200. It was mutually agreed between Shrosbree and his parents that the family should recover $70,000 for hefty medical and schooling bills that they had paid on his behalf. $5,000 would go to Shrosbree for his future benefit. They agreed that Waechter should take the balance of the money for his fee.[8] Waechter agreed to accommodate his family's needs. Tr. 175, 199-202, 263-69, 286-90, 300-01. Colleen held the sum of $5,000 under the power of attorney for her son's benefit. Tr. 269, 288-90. Shrosbree was "more than okay" with his uncle receiving the remainder. Tr. 264-656. It was always

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specifically recall whether his nephew signed one; however, he wrote to his sister and her husband in June 2007 advising them to keep the power of attorney current and Colleen testified that they executed a renewed power of attorney because she continued to hold funds on her son's behalf after the 2008 settlement to avoid his using the money to his detriment. Ex. A96; Tr. 209, 215-17, 266, 286-90, 295-96.

[8] That is approximately half of what a standard one third contingent fee would have earned Waechter.

the family's intention that any additional money should go to Waechter as a fee and for other work he did for Johnny. Tr. 283, 302-04.

Four years then passed. In May 2012, Waechter received a check from Encompass, the carrier for the car driver in Shrosbree's case, made out to him and Shrosbree for $17,698.32 identified as "pro rata share of attorney fees Matsyuk case." Ex. A90; Tr. 175. Waechter had no recollection of receiving a cover letter of explanation or the reference to *Matsyuk*. Tr. 203-07. After reviewing that case, Waechter remained uncertain as to whom the funds belonged and whether the case applied. *Id.*; Tr. 252.

Waechter did know that at that time Johnny was deeply involved with drugs again and he had left Seattle to stay with his mother and an uncle out of state to clean up. Tr. 177-78, 207, 270-72, 280-81, 291-94, 307-09. Accordingly, he called Colleen and advised her about the check. *Id.*; Tr. 206-07, 279-83, 290-91, 299. After discussion, she directed him to endorse the check and keep the money for services he had provided to Shrosbree over the years as they had intended. *Id.*; 300-04. Colleen believed she was acting under the power of attorney. Tr. 290. At the time, Waechter believed this was a family matter, he was accustomed to consulting with the parents, and he was concerned about potential harm to the nephew if he should come into money to spend on drugs. *Id.*; Tr. 177-

8, 207. Waechter then signed Shrosbree's name to the check along with his and deposited it into his trust account. Over the next two weeks, he disbursed the funds to his office account and to pay a bill. Tr. 176-77, 207-08.

After ODC began looking at his trust account, Waechter was advised the money belonged to Shrosbree. Waechter wrote a check to his nephew for $17,500 and sent it to him. Ex. A93, A94; Tr. 208, 212-14. Waechter now realizes he should have approached this matter as a lawyer to client, and not as an uncle.

As for Shrosbree, he has now successfully gained control over his addiction. Tr. 270-72. He testified that his mother made the right decision not to pay him in May 2012, and she made the right decision by giving the money to Waechter who had provided legal advice to him in other matter. He testified that if he had been consulted, he would have followed his mother's advice because he wanted to get this addiction under control. *Id.*

From this set of facts, the ODC charged Waechter with four separate counts relating to the Shrosbree matters. Count 12 charged him for failing to notify Shrosbree about the receipt of the funds, implicating four separate RPC provisions. Count 13 charged him with converting funds received from Encompass implicating four separate RPC provision. This included a RPC 8.4(b) violation for an underlying criminal theft

charge. Count 14 made a separate charge for signing Shrosbree's name to the check, implicating three RPC provisions and again interjecting a criminal violation under RPC 8.4(b) for forgery. Count 15 charged a violation for failing to provide Shrosbree an accounting.

The Hearing Officer found violations of all these counts, including criminal violations proved by a clear preponderance of the evidence. CL 158-61.

(4) Proceedings Below

Waechter made a full and free disclosure to ODC during its investigation and the hearing on this matter; ODC acknowledges that Waechter did not make any false statements during its investigation. Tr. 578. The proceedings before the Hearing Officer took place on May 16 through May 18, 2016. The Hearing Officer's findings of fact and conclusions of law finding Waechter guilty of every count of charged misconduct with a recommendation of disbarment were issued June 5, 2016. Waechter filed a motion for reconsideration as to the sanction that was denied August 8, 2016. ODC moved to modify, amend, or correct the findings and the Hearing Officer granted the motion, modifying CL 175 to remove the factors of personal or emotional problems and disability from the list of applicable mitigating factors. Waechter then timely appealed to the Board. The Board unanimously adopted the Hearing Officer's

decision on March 3, 2017. That decision was timely appealed to this Court on April 11, 2017.

D. SUMMARY OF ARGUMENT

Waechter asks this Court to reject the Board's recommended sanction of disbarment, and to impose instead a suspension. Waechter's return to the practice should be conditioned on his meeting CLE requirements relating to law office management and proper financial management. He should have a practice monitor who supervises his trust account so that there will never again be an issue as to the integrity of his financial trust responsibilities.

The Hearing Officer's findings on intent or level of culpability, adopted by the Board, are unsupported. The circumstances of the various transactions and the context in which they occurred are set forth above. It should be significant that the operative facts on the various instances of misappropriation of client funds are not contested. Waechter does not contest the extremely serious nature of each of those breaches of duty. But the determination that he "knowingly" appropriated client funds cannot stand where the facts more plainly support negligence on Waechter's part in his office operation.

More critically, the Board erred in its recommendation of disbarment. In Waechter's almost a quarter of a century as a lawyer, he

has no prior discipline. Other attorneys have testified to his good work and moral character. The soundness of his character is reflected in his acceptance of responsibility, remorse, and shame for his lapses and letting his clients down.[9] What happened here was an anomaly, not representative of Waechter's legal practice or his character.

The Board erred in concluding that only the sanction of disbarment was appropriate here because the Board failed to credit Waechter's undisputed personal and emotional problems as a sanction-mitigating factor, and the sanction recommendation was predicated upon ODC charging of Waechter in a fashion that violated double jeopardy principles. A sanction of disbarment would be excessive.

E. ARGUMENT

(1) Principles on Sanctions in Lawyer Discipline

The law relative this Court's role in lawyer discipline is well known in this Court. When a lawyer discipline decision by the Board is appealed, this Court has "plenary authority" on review. *In re Disciplinary Proceedings Against Haley*, 156 Wn.2d 324, 333, 126 P.3d 1262 (2006). The Bar has the burden of proof in a disciplinary proceeding, which is by a clear preponderance of the evidence. ELC 10.14(b). This Court ordinarily does not disturb the Board's findings if they are supported by a

[9] Tr. 459-60, 467-69.

substantial evidence, but in making that determination, the Court looks to the entire record. *In re Disciplinary Proceeding Against Poole,* 156 Wn.2d 196, 208-9, 125 P.3d 954 (2006). Given the higher burden of proof – clear preponderance – this Court's review of finding of facts also requires a greater quantum of evidence to sustain "substantiality." *In re Disciplinary Proceedings Against Marshall*, 160 Wn.2d 317, 330, 157 P.3d 859 (2007) (clear preponderance is greater than simple preponderance but more than a reasonable doubt and the Court's "substantial evidence review should therefore take into account the clear preponderance burden of proof.").

This Court reviews conclusion of law *de novo*. *Haley*, 156 Wn.2d at 333. Moreover, on sanctions, while this Court does not lightly depart from the Board's recommendation, it is "not bound by it." *Id.* (*citing In re Disciplinary Proceedings Against Tasker,* 141 Wn.2d 557, 565, 9 P.3d 822 (2000)). This comports with the exclusive responsibility of this Court to administer lawyer discipline and its inherent power maintain appropriate standards of lawyer discipline. ELC 2.1. This same power allows this Court to promulgate rules of discipline, interpret, and enforce them. *Id.*

As to sanctions, this Court has adopted the ABA *Standards for Imposing Sanctions* as a guide to determine appropriate sanction in a

disciplinary case. *Haley*, 156 Wn.2d at 339 (*citing In re Disciplinary Proceeding Against Johnson,* 114 Wn.2d 737, 745, 790 P.2d 1227 (1990)). Under the ABA *Standards,* after misconduct is found, this Court performs a two-part analysis. First, it determines the presumptive sanction based on the ethical duty violated, the attorney's mental state, and the extent of actual or potential harm caused by the attorney's conduct. Second, the Court considers aggravating and mitigating factors which may alter the presumptive sanction, increasing it or diminishing it. *See Standards* § 9. Thus, an aggravating factor can increase a sanction or offset mitigating factors. The failure to consider a mitigating factor, at a minimum, precludes the possibility of a reduced sanction and will more likely result in increased sanction. Finally, the Court assesses the proportionality of the sanction to the attorney's misconduct. *In re Disciplinary Against Preszler*, 169 Wn.2d 1, 18-19, 232 P.3d 1118 (2010).

Generally, in attorney discipline cases, this Court will adopt the recommendation of the Board unless it can articulate specific grounds from five factors to support departure from the Board's recommendation. *In re Disciplinary Proceedings Against Heard,* 136 Wn.2d 405, 963 P.2d 818 (1998).

1. The purposes of attorney discipline (sanction must protect the public and deter other attorneys from similar conduct);

2. The proportionality of the sanction to the misconduct (sanction must not depart significantly from sanctions imposed in similar cases);

3. The effect of the sanction on the attorney (sanction must not be clearly excessive);

4. The record developed by the hearing panel (sanction must be fairly supported by the record and must not be based upon considerations not supported by the record); and

5. The extent of agreement among the members of the Board (sanction supported by unanimous recommendation will not be rejected in the absence of clear reasons).

Id. at 423-24.

Here, several of the enumerated factors are present. A suspension followed by probation will clearly protect the public and deter other attorneys. That is particularly true in light of the fact that the misconduct occurred during a fifteen-month period in a career of almost a quarter century characterized by no allegations of sanctionable conduct; this was an aberration in Waechter's career. The individual clients suffered little or no actual harm; some ended up actually receiving more than they would have if Waechter had followed his fee agreement and took a full fee.

But more significantly, as is discussed below, the sanction is excessive because the Board refused to consider as a mitigating factor the personal and emotional problems Waechter had during the relevant time

period. The Board's recommended sanction was predicated upon multiple counts of liability, and an aggravating factor based upon a multiplicity of counts, violating Waechter's constitutional right against double jeopardy. Thus, the sanction is not fairly supported by the record and was based upon considerations not supported by the record. Ultimately, it was excessive.

(2) The Board Committed Erred By Not Having a Mitigating Factor of Personal or Emotional Problems

The Board erred by failing to find a mitigating factor of personal or emotional problems. It did so by ignoring all evidence of such a mitigating factor and by conflating the need to prove emotional problems by medical evidence from the time period.

The ABA *Standards* § 9.31 list *separately* as mitigating factors (c) personal or emotional problems and (i) mental disability. The mental disability section is clear that it must be proved by medical evidence. That demonstrates that if the drafters of the *Standards* required medical testimony to prove the mitigating factor, they knew how to do so. They chose not to have that requirement to establish personal or emotional problems. Yet the Hearing Officer, and the Board, seem to have conflated the medical testimony discussed above relating to Dr. Miranda as

precluding any mitigating factor of personal or emotional problems. That was error.[10]

Although Waechter did satisfy the requisite burden of proof to show "mental disability," there can be no doubt that there was significant testimony proving that he was suffering significant personal and emotional problems during this period of time. Waechter does not contest the presence of financial motive for him in this period of time, but it was not the sole or even the primary reason for this sequence of anomalous departures from everything he had stood for before in his professional life. The Hearing Officer's apparent belief that Waechter was driven by greed or money cannot be squared with the fee reductions to the clients discussed above. The traumatic events of 2012, primarily the losses of the *Anderson* and *Majeski* trials, and Waechter's feelings of despair and failure, were significant components of his unusual departures from duty.

In *In re Disciplinary Proceeding Against Burtch,* 112 Wn.2d 19, 770 P.2d 174 (1989), the attorney suffered from depression and emotional and personal problems (bankruptcy and marital separation) and gave these as reasons for his lack of diligence, failure to timely file trust account declarations and failure to cooperate with a disciplinary investigation. The

[10] Indeed, if medical evidence was required to find the mitigating factor of personal and emotional problems, there would be nothing to distinguish it from the mitigating factor of "mental disability."

Board recommended a 90–day suspension followed by two years' probation. This Court decreased the sanction to a 45–day suspension followed by probation, concluding that the attorney's reputation in the legal community and his long years of practice without client complaint justified the leniency of the sanction, finding "personal and emotional problems which may have led to mental impairment" stemming from the financial and marital problems. There was no indication in that decision that medical evidence was needed to establish the mitigating factor of personal or emotional problems. More recently, in *In re Disciplinary Proceeding Against Anschell,* 149 Wn.2d 484, 518, 69 P.3d 844 (2003) this Court cited *Burtch* but refused to follow it because the attorney had produced no evidence of personal or emotional problems. Similarly, in *In re Disciplinary Proceeding Against Trejo*, 163 Wn.2d 701, 731, 185 P.3d 1160, 1175 (2008), the Court held that the mitigating factor of personal or emotional problems did not apply because Trejo failed to offer any evidence to support his assertion that he was undergoing personal or emotional problems during the audit period. Again, there is no mention that medical evidence was required.

While Waechter did suffer from financial problems, his personal and emotional problems arose primarily from the loss of three trials in quick succession and the belief that he had let his clients down; financial

problems compounded the problems but they were not the sole or primary cause.

The Board was wrong in concluding that medical evidence is required for a finding of personal or emotional problems. There is no mention of such a requirement in *Burtch, Anschell* or *Trejo.* In some cases, this Court has been imprecise, seemingly conflating the two mitigating factors. For example, in *In re Disciplinary Proceeding Against Christopher,* 153 Wn.2d 669, 105 P.3d 976 (2005), the Court stated that the personal or emotional problems factor is equivalent to a mental disability, citing *In re Disciplinary Proceeding Against Kuvara,* 149 Wn.2d 237, 247-49, 63 Wn.2d 1057 (2003) and *In re Disciplinary Proceeding Against McLendon,* 120 Wn.2d 761, 773, 845 P.2d 1006 (1993). However, neither *Kuvara* nor *McLendon* say that.[11] Further, in *Christopher,* the Court (1) found that there was no connection between the personal and emotional problems and the wrongdoing so that the issue was irrelevant; and it (2) upheld the other mitigating factors and the Board's recommendation of an 18-month suspension (denying WSBA's request for disbarment). In practical terms, the Court's comments on mitigation did

[11] *Kuvara* was concerned with whether Kuvara's alcoholism met the elements of a mental disability. (It did not because he was unable to show (a) a connection between his drink problem and the misconduct; and (2) a sustained period of rehabilitation. *Id.* at 247-49). Similarly, *McLendon* concerned an attorney with a mental disability, bipolar disorder. Neither case discussed personal or emotional problems.

not affect the outcome. *See also*, *In re Disciplinary Proceeding Against Peterson,* 120 Wn.2d 833, 871, 846 P.2d 1330 (1993) (the Court failed to distinguish between a mental disability and personal and emotional problems). As this case demonstrates, there is a need for this Court to clarify the jurisprudence so that it is known how the two mitigating factors differ and whether medical testimony is required.

But even though the Board disregarded Waechter's medical testimony, the Board implicitly conceded that Waechter demonstrated that his personal and emotional problems existed:

> To the extent that Respondent had personal or emotional problems, they were caused by normal adverse professional events such as losing litigated cases, the resulting financial setbacks, and his need for funds following his professional reversals. None of these circumstances justify conversion of client funds or Respondent's other violations of the RPC. The mitigating factor of personal or emotional problems does not apply.

CL 181.

The Hearing Officer (who made the finding) is not a medical expert and had no basis, without any psychological evidence to the contrary to opine on what constitutes "normal professional events" and the effect of resulting financial setbacks would have on Waechter or anybody else. What Waechter experienced was almost certainly nothing like the Hearing Officer would have experienced in his decades of his large firm

practice where billing clients on an hourly basis was the norm.

Moreover, the finding demonstrates a lack of understanding of a mitigating factor. These circumstances do not justify conversion of client funds. Neither Waechter nor anyone else suggested that they do. They do, however, go to the lawyer's mental state which is central to the what punishment is presumed under the *Standards* and whether the sanction should be decreased. The Board erred in disregarding Waechter's personal and emotional problems in determining the sanction recommendation.

(3) The Multiplicity of Prosecutorial Counts Violated Waechter's Constitutional Right Against Double Jeopardy and Punished Him More Multiple Times for the Same Conduct.

ODC charged Waechter multiply for essentially the same conduct. That overcharging resulted in multiple violations of ethical standards, dramatically enhancing the Board's recommended sanction for Waechter, as noted *supra*. As such, the ODC's actions violated Waechter's constitutional rights.

Double jeopardy, a constitutional protection contained in the Fifth Amendment to the U.S. Constitution and art. 1, § 9 of the Washington Constitution, has three aspects, but the aspect relevant here is that protects a defendant from being punished multiple times for the same offense by

overzealous prosecuting authorities. This Court's rich body of case law on units of prosecution applies to lawyer discipline and forecloses the Board's recommended sanction of disbarment.

(a) Waechter May Raise Double Jeopardy for the First Time on Appeal to This Court

Waechter did not raise this double jeopardy argument below. However, he is permitted to do so now. ELC 12.1 provides the Rules of Appellate Procedure serve as guidance for Supreme Court review and nothing in the ELC's prohibits raising the issue for the first time on appeal. RAP 2.5 (a) specifically allows it:

> The appellate court may refuse to review any claim of error which was not raised in the trial court. However, a party may raise the following claimed errors for the first time in the appellate court:… (3) manifest error affecting a constitutional right.

RAP 2.5(a)(3) applies in the civil setting to allow constitutional issues to be raised for the first time on appeal. *State v. WWJ Corp.*, 138 Wn.2d 595, 602-03, 980 P.2d 1257 (1999). In the criminal law context, this Court allowed the double jeopardy argument to be raised for the first time on appeal numerous instances beginning with *State v. Adel*, 136 Wn.2d 629, 631-32, 965 P.2d 1072 (1998). *State v. Tvedt*, 153 Wn.2d 705, 709 n.1, 107 P.3d 728 (2005). *See also*, *State v. Turner*, 102 Wn.

App. 202, 206, 6 P.3d 1226 (2000), *review denied*, 143 Wn.2d 1009 (2001).

Here, Waechter's argument on double jeopardy satisfies the requirement for RAP 2.5(a)(3) established in cases like *State v. Kalebaugh*, 183 Wn.2d 578, 355 P.3d 253 (2015) and *State v. Lamar*, 180 Wn.2d 576, 327 P.3d 46 (2014) that an error of a constitutional dimension is present and it was manifest, affecting his rights at hearing to his prejudice.

(b) Double Jeopardy and the Unit of Prosecution

In analyzing overzealous charging of criminal defendants in the double jeopardy setting, this Court has employed the concept of a unit of prosecution.[12] A prosecutorial authority may not multiply charge for essentially the same conduct, the unit of prosecution. In *Adel*, this Court first discussed units of prosecution. Usually the issue arises when a

[12] Double jeopardy is also applicable in the lawyer discipline context. This Court long ago held that the predecessor to the Rules of Professional Conduct were "quasi-criminal" in nature. *In re Discipline of Little,* 40 Wn.2d 421, 430, 244 P.2d 255 (1952); The ethics rules and the punishments that result from their violation protect the public, but they also punish an offer and do not compensate a victim. Professional discipline "is punitive, unavoidably so, despite the fact that it is not designed for the purpose." *Id*. The United States Supreme Court in *In re Ruffalo,* 390 U.S. 544, 88 S. Ct. 1222, 20 L. Ed. 2d 117 (1968) held that disbarment is punishment, a penalty imposed on a lawyer, and therefore the lawyer had constitutional protections such as due process. Other professional discipline proceedings have been held to be "quasi-criminal" in nature and thus constitutional protections such as due process apply. *In re Kindschi*, 52 Wn.2d 8, 10-11, 319 P.2d 824 (1958); *Washington State Medical Disciplinary Board v. Johnston,* 99 Wn.2d 466, 663 P.2d 457 (1983); *Nguyen v. Dep't of Health,* 144 Wn.2d 516, 29 P.3d 689 (2001).

defendant is convicted multiple times for violating a statute. The courts have recognized that the Legislature has the power to define what is punishable.[13] But to protect the constitutional right against double jeopardy, this Court has recognized the need to determine what is the unit of prosecution that the Legislature intended as the punishable act. The unit of prosecution is the scope of the criminal act to be punished. *Adel*, 136 Wn.2d at 634-35; *State v. Reeder,* 184 Wn.2d 805, 825, 365 P.3d 1243 (2015). In determining what unit of prosecution the Legislature intended as the punishable act, any ambiguity should be construed in favor of lenity. *State v. Bobic,* 140 Wn.2d 250, 261. 996 P.2d 610 (2000).[14] A unit of prosecution for double jeopardy purposes can be either an act or course of conduct. *State v. Hall,* 168 Wn.2d 726, 731, 230 P.3d 1048 (2010). In addition, double jeopardy can apply if a defendant has multiple convictions for violating several statutory provisions. That is true if the same evidence, the same conduct, gives rise to the multiple convictions. *Bobic*, 140 Wn.2d at 261.

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[13] In the lawyer discipline context, the "statute" being applied does not emanate from the Legislature, but from the rules promulgated from this Court. In construing court rules like the RPC, this Court has held they "are subject to the same principles of construction as are statutes." *In re Disciplinary Proceedings Against McGlothlen,* 99 Wn.2d 515, 522, 663 P.2d 1330 (1983).

[14] The principle of lenity applies in lawyer discipline. This Court held "in a disciplinary proceeding, all doubts should be resolved in favor of the attorney." *In re Disciplinary Proceeding Against Krogh,* 85 Wn.2d 462, 483, 536 P.2d 578 (1975); *Haley,* 156 Wn.2d at 350.

In recent cases, for example, this Court concluded that a defendant's solicitation in a single conversation of the murder of four people was a single unit of prosecution. *State v. Varnell*, 162 Wn.2d 105, 170 P.3d 34 (2007). The unit of prosecution was the solicitation not the number of potential victims. In *Hall*, the issue was the unit of prosecution for witness tampering, a continuing course of conduct. Because the defendant's conduct was continuous, aimed at a single person, and meant to tamper with testimony in a single proceeding, there was only one unit of prosecution. *Id*. at 736.

(c) The ODC's Charging of Waechter Violated Double Jeopardy

Hall is particularly apt here. The WSBA went overboard in charging Waechter and in imposing the disbarment punishment in contravention of his right to avoid double jeopardy. This is evident in a variety of ways. In fashioning the modern unit of prosecution analysis to protect against double jeopardy in *Adel*, this Court recognized that prosecutors will always attempt to distinguish two charges by dividing the evidence supporting each charge into distinct segments. *Adel*, 136 Wn.2d at 633-34. That is exactly what happened in the Shrosbree matter. The ODC charged and prosecuted Waechter for four counts relating to essentially the same offense. The result was four separate legal

conclusions for disbarment. CL 158-61, 171-74. The presumed punishment was then "aggravated" by a finding of multiple offenses. CL 175. The essence of the misconduct, the offense that should be punished, is that based upon the discussion with Colleen, Waechter took the Encompass refund that should have gone to his nephew. The ODC broke that conversion of funds into four separate counts. Count 12 was not originally telling Shrosbree about the receipt of the funds. Count 13 was converting the funds. Count 14 was signing Shrosbree's name to the check and depositing it, which is how the conversion in Count 13 happened, and then Count 14 for not giving Shrosbree an accounting of the conversion after the fact. Each of these counts relates to essentially one overall act of "conversion." Since it was done in consultation with his sister, who until that point had managed the nephews' affairs relative to the litigation from the accident, it is akin to conspiracy in which Waechter took the affirmative steps. In the conspiracy context, this Court rejected the concept that an agreement to steal, strip, repurchase, and resell vehicles for profit could be charged separately. *Bobic*, 140 Wn.2d at 262-67. This exemplifies multiple punishment for the same course of conduct, in violation of double jeopardy protections.

The creation of multiple counts all relating to the same conduct is also evident in regard to the Weisel matter. There, if Waechter took no fee

and paid the liens and costs, Weisel would have netted $2,256.08. Because Waechter took no fee, and Premiere ultimately waiving its lien, Weisel obtained instead $5,658.58. From these circumstances, the ODC prosecuted and convicted Waechter of five separate counts. Count 3 was for taking funds belonging to third parties, relating to the liens. Count 4 was for failing to maintain client funds in trust.[15] Count 5 is disbursing funds on Weisel's behalf that exceeded the funds Waechter had on deposit. That is another version of Count 4 of failing to keep funds in trust or converting them in Count 3. Finally, by telling Weisel that he was not taking a fee, which he ultimately ended up not doing, this constituted a violation of Count 6. Then, failing to give Weisel another accounting gave rise to Count 7. Waechtel was convicted for failing to timely pay third parties in Count 8 but Premera ultimately waived its lien since it could not be justified and Weisel benefited, obtaining $1,000. All these Weisel counts basically relate to taking some of the funds to pay the liens and not paying them in the proper time frame. This is a classic case of breaking everything into each component part to bring multiple charges.

When money is improperly converted from a trust account, that throws the balance of the account off and by its nature could affect every

[15] Obviously, if the lien money had to be kept in trust until paid to the third party, Count 3 for taking the money is the same conduct as failing to keep it in trust.

client who had funds in the account if all sums had to paid out immediately for all clients. Waechter stipulated that he did not do proper reconciliations, have individual client ledgers, or do reconciliations. But instead of just focusing on funds that were not properly disbursed, the ODC brought a separate count for all clients who had funds in the trust account during the applicable period in Count 4. "Failing to maintain" is just the other side of the same coin of not "properly disbursing." It is double punishment for the same conduct, including conduct related to stipulated bad accounting.

The effect of this double punishment is heightened by then loading up the punishment by finding multiple counts as an aggravating factor.[16]

Moreover, the multiple charging also involved duplicative charges for criminal violations in Count 1 (theft), Count 3 (theft), Count 13 (theft), and Count 14 (forgery). There was no criminal prosecution here or even proof of such criminal conduct beyond a reasonable doubt. There was no evidence of a criminal conviction that was "conclusive evidence" of a criminal conviction under ELC 10.14 (c), a standard usually applicable to proof of an actual criminal charge by a prosecuting attorney. Rather, the Hearing Officer found Waechter guilty of criminal violations, not by the

[16] Although this Court has allowed two RPC violations to be found for the same conduct in *Poole,* that case pales in comparison to the multiple charges here. The *Poole* court did not address the double jeopardy issue raised by Waechter.

beyond a reasonable doubt standard applicable to crimes, but by a clear preponderance of the evidence under ELC 10.14 (b). In addition to the fact that these "crimes" are duplicative of the conversion and other counts charged, they were used to justify the disbarment penalty by the utilization of *Standard* 5.11 in regard to Counts 1, 13, and 15. Again, this is double punishment for the same conduct.

(4) The Board's Disbarment Recommendation Is Excessive

In assessing proportionality of the Board's recommended sanction, this Court looks to other, similar cases. *Preszler*, 169 Wn.2d at 38; *Marshall*, 160 Wn.2d at 348-49. Ultimately, the Board's recommended disbarment sanction here is unfair, for the legal reasons set forth *supra*, but also on the facts here. Waechter is a caring lawyer who made serious mistakes in the financial aspect of his practice at a time when he had weighty personal and emotional problems. He had no prior discipline. He is remorseful, and cooperated with the WSBA's investigation. No client has suffered monetary deprivation. He is not seeking to evade responsibility (or a sanction) for this conduct, but rather is hoping to again practice the profession he loves, with appropriate conditions.

This Court has not elected to disbar attorneys for misconduct akin to Waechter's. For example, in *In re Disciplinary Proceedings Against McKean*, 148 Wn.2d 849, 64 P.3d 1226 (2003), this Court imposed a 6-

month suspension followed by a 6-month probationary period against an attorney who financed a business with funds from his trust account and otherwise used that account for personal ends. In *Tasker*, *supra*, this Court rejected the Board's disbarment recommendation in favor of a 2-year suspension of an attorney who commingled funds from his office checking account and his trust account, and used the commingled funds to pay office and personal expenses. Ultimately, clients were reimbursed by that attorney. The Court found a proportionality analysis there to be particularly salient. 141 Wn.2d at 571-72. In *In re Disciplinary Proceedings Against Oh*, 176 Wn.2d 245, 290 P.3d 963 (2012), this Court found that an attorney's extensive failure to maintain client funds in an IOLTA account and then using funds for personal purposes merited only a one-year suspension. *See also*, *In re Disciplinary Proceedings of Against Blanchard*, 158 Wn.2d 317, 144 P.3d 286 (2006) (court reduced one-year suspension for depositing client funds into business account to 6 months); *Trejo*, 163 Wn.2d at 701 (attorney given three-month suspension and two years of probation where he deposited fees in trust account to avoid creditors and allowed an employee to conduct a check floating scheme because of inadequate supervision); *In re Disciplinary Proceedings Against Cramer*, 165 Wn.2d 323, 198 P.3d 485 (2008) (8 months

suspension where attorney deposited client funds into his business account and lied to WSBA).

In sum, disbarment is an excessive sanction for Waechter's conduct in light of this Court's treatment of financial transgressions of this sort.

E. CONCLUSION

William Waechter made serious mistakes in his handling of client financial matters. His office accounting practices were unacceptably lax. But Waechter should not be disbarred for these actions where the ODC aggressively overcharged him for the identical conduct, thereby enhancing the sanctions against him, and the Hearing Officer disregarded expert testimony on Waechter's mental state; simply put, the Board illicitly enhanced the aggravating factors and ignored a vital mitigating factor in arriving at its sanction decision. The Board's recommended disbarment sanction is patently unfair.

This Court should suspend Waechter with appropriate conditions on his return to practice.

DATED this 16th day of August, 2017.

Respectfully submitted,

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APPENDIX

FILED
JUL 06 2016
DISCIPLINARY BOARD

BEFORE THE
DISCIPLINARY BOARD
OF THE
WASHINGTON STATE BAR ASSOCIATION

In re **WILLIAM H. WAECHTER,** Lawyer (Bar No. 20602).	Proceeding No. 14#00076 FINDINGS OF FACT, CONCLUSIONS OF LAW AND HEARING OFFICER'S RECOMMENDATION

The undersigned Hearing Officer held the hearing on May 16, 2016 through May 18, 2016 under Rule 10.13 of the Rules for Enforcement of Lawyer Conduct (ELC). Respondent William H. Waechter appeared at the hearing with his lawyer, Samuel B. Franklin. Disciplinary Counsel Francesca D'Angelo appeared for the Office of Disciplinary Counsel (ODC) of the Washington State Bar Association.

FORMAL COMPLAINT

The Formal Complaint charged Respondent with the following counts of misconduct:

- Count 1 - By removing funds from his trust account unrelated to any client authorization, Respondent converted funds for his own use and violated RPC 8.4(b) (by committing the crime of theft in violation of RCW 9A.56.010 et seq.), RPC 1.15A(b) and/or RPC 8.4(c).

- Count 2 - By converting portions of KH'S clients' settlement funds to his own use,

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003

Respondent violated RPC 1.15A(b).

- Count 3 - By taking funds in the TW case that were due to third parties, Respondent converted the funds for his own use and violated RPC 8.4(b) (by committing the crime of theft in violation of RCW 9A.56.010 et seq.) and/or RPC 1.15A(b) and/or RPC 1.15A(f) and/or RPC 8.4(c) and/or RPC 8.4(i).

- Count 4 - By failing to maintain clients funds in trust in the TW, DR, CR and/or TJ matters, Respondent violated RPC 1.15A(c)(1).

- Count 5 - By disbursing funds on behalf of TW that exceeded the funds TW had on deposit matter, Respondent violated RPC 1.15A(h)(8).

- Count 6 - By misrepresenting to client TW that he took no fee in her personal injury matter and/or that he paid $2,500 to State Farm and/or Premera, Respondent violated RPC 8.4(c).

- Count 7 - By failing to provide an accurate written accounting to his clients after distributing their funds held in trust in the TW and/or KH matters, Respondent violated RPC 1.15A(e) and/or RPC 1.4 and/or RPC 1.5(c)(3).

- Count 8- By failing to promptly pay clients and/or third parties funds which were due to them in the DR, KH and/or TW matters, Respondent violated RPC 1.15A(f).

- Count 9 - By failing to maintain a checkbook register for his trust account which included entries for all transactions and a new trust account balance after each receipt, disbursement, or transfer, Respondent violated RPC 1.15B(a)(1)(v).

- Count 10 - By failing to maintain individual client ledgers, Respondent violated RPC 1.15B(a)(2).

- Count 11- By failing to reconcile his trust account records on a monthly basis, Respondent violated RPC 1.15A(h)(6).

- Count 12- By failing to inform Mr. Shrosbree of the receipt of funds from Encompass Insurance, Respondent violated RPC 1.4(a)(1) and/or RPC 1.4(a)(3) and/or RPC 1.4(b) and/or RPC 1.15A(d).

- Count 13 - By converting the funds received from Encompass Insurance to his own use, Respondent violated RPC 8.4(b) (by committing the crime of theft in violation of RCW 9A.56.010-050) and/or RPC 1.15A(b) and/or RPC 8.4(c) and/or RPC 8.4(i).

- Count 14 - By signing Mr. Shrosbree's name on the Encompass Insurance check and/or by depositing the Encompass Insurance check into his trust account, knowing that the check contained a false signature and/or by presenting the signature on the Encompass Insurance check as true knowing it to be forged, Respondent violated

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RPC 8.4(b) [by committing the crime of forgery in violation of RCW 9A.60.020] and/or RPC 8.4(c) and/or 8.4(i).

- Count 15 - By failing to provide a written accounting to Mr. Shrosbree after distributing the funds received from Encompass Insurance, Respondent violated RPC 1.15A(e).

Based on the pleadings in the case, the testimony, exhibits, and the pre-hearing stipulation entered into by the parties on May 13, 2016, the Hearing Officer makes the following:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Respondent was admitted to the practice of law in 1991.

A. Count 1

Findings of Fact

2. Respondent maintained a trust account with Commerce Bank ending in 0307.

3. On January 25, 2012, Respondent transferred $100 from his trust account ending in 0307 to his operating account ending in 0293.

4. On March 13, 2012, Respondent transferred $1,500 from his trust account ending in 0307 to his operating account ending in 0293.

5. On May 4, 2012, Respondent transferred $200 from his trust account ending in 0307 to his operating account ending 0293.

6. On July 27, 2012, Respondent wrote a $3,000 check to himself from his trust account.

7. On August 10, 2012, Respondent wrote a $5,000 check to himself from his trust account.

8. On March 12, 2013, Respondent wrote a check for $500 to himself from his trust account.

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9. These disbursements were not related to the interests of any client whose funds Respondent was holding in his trust account.

10. Respondent was not entitled the funds.

11. Respondent knew that he was not entitled to the funds when he disbursed the funds from his trust account to himself.

12. Respondent used the funds for his own benefit.

13. Respondent had no rational explanations for the withdrawals.

14. Respondent's claims that he had no conscious awareness of making the withdrawals and that the withdrawals were the result of bad accounting are not credible.

15. Respondent's claims that he thought he was entitled to the funds that he took were not credible. Respondent knew that he was not entitled to the funds.

16. Respondent converted the funds knowingly and intentionally with the intent to deprive his clients or third parties of their funds for a period of time.

17. Respondent took the funds because his operating accounts were short of money. Respondent needed the money because his legal practice was not making money.

18. Respondent calculated the amounts needed to cover shortages in his operating account and then withdrew the amounts needed from the trust account.

Conclusions of Law

19. Count 1 has been proven by a clear preponderance of the evidence. Respondent's conduct violated RPC 8.4(b) (by violating RCW 9A.56.010), RPC 1.15A(b) and RPC 8.4(c).

B. Counts 2-7

Findings of Fact

Tori Weisel

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20. Respondent represented Tori Weisel in a personal injury matter.

21. Respondent's fee agreement with Ms. Weisel provided for a contingency fee of 33% of the gross settlement.

22. On October 12, 2012, Respondent settled Ms. Wiesel's case for $7,250.

23. Respondent deposited the funds into his trust account.

24. On November 2, 2012, Respondent took a fee of $2,000 from the trust account for Ms. Weisel's case.

25. Respondent did not give notice to Ms. Weisel of his intent to take the fee through a billing statement or other document.

26. Respondent did not provide Ms. Weisel with a written accounting to reflect the $2,000 disbursal.

27. On December 12, 2012, Respondent wrote Ms. Weisel and told her that he was in the process of negotiating with the subrogation interest holders, State Farm and Premera Blue Cross (Premera).

28. In the same correspondence, Respondent stated that he would waive his fee in her case. Respondent knew that this statement was untrue.

29. Respondent had already disbursed $2,000 to himself as attorney's fees, but did not inform Ms. Weisel of this fact.

30. On January 17, 2013, Respondent sent Ms. Weisel an email with an accounting of the costs and fees in the case.

31. The accounting stated that Respondent's fees would be -0-, that he would pay a total of $2,500 to State Farm and Premera and that costs would be $101.42.

32. Respondent knew that the accounting was false and misleading since he had

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already taken $2,000 as his fee and that Ms. Weisel did not have sufficient funds remaining in his trust account to pay State Farm or Premera.

33. Respondent disbursed the $2,000 of the funds that he represented would be paid to State Farm and Premera to himself for his own benefit when he took that sum as a fee.

34. Respondent converted the funds owed to State Farm and Premera intentionally, with the intent to deprive State Farm and/or Premera of their funds for some period of time.

35. Respondent did not provide Ms. Weisel an updated settlement statement or otherwise account to Ms. Weisel for the $2,500 that should have been paid to State Farm and Premera.

36. Ms. Weisel was injured in that she was deceived as to the amount of fees taken by Respondent, was not given an opportunity to object to the handling of her settlement funds, and was deceived as to the amount of funds she was entitled to receive.

37. Respondent did not make payment to State Farm until October 2014 and did not make a payment to Premera.

38. On March 25, 2013, Respondent issued Ms. Weisel a check for $4,648.58.

39. On March 25, 2013, Respondent's trust account did not have sufficient funds remaining from Ms. Weisel's settlement to cover the check because Respondent had disbursed her funds on behalf of other clients and to himself.

40. Respondent used other clients' funds to cover the March 25, 2013 check issued to Ms. Weisel.

41. Respondent knew that Ms. Weisel's funds were no longer in trust and that he was using other client funds to cover her payment.

42. There was injury to the clients whose funds were used to pay Ms. Weisel and to

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Ms. Weisel whose funds had been depleted by other disbursements.

43. On August 6, 2013, Respondent disbursed $601.42 to himself as costs related to Ms. Weisel's matter.

44. Respondent was not entitled to $500 of the amount disbursed to himself as costs related to Ms. Weisel's matter. According to Respondent's settlement statement, the $500 should have been paid to State Farm and/or Premera.

45. Respondent used the funds for his own benefit.

46. In October 2014, Respondent paid $1,500 to State Farm when they contacted him about their unpaid claim.

47. At some point thereafter, Respondent learned that Premera had waived their $1,000 subrogation.

48. On May 2, 2016, two weeks before his disciplinary hearing, Respondent issued a check to Ms. Weisel for $1,000.

49. State Farm was injured in that its payment was delayed. Ms. Weisel was injured in that she did not receive the funds that were due her until May 2016.

Karen Huster

50. Respondent represented Karen Huster in a personal injury matter.

51. Respondent's fee agreement with Ms. Huster provided for a contingency fee of 33 1/3% of the gross settlement.

52. In or around February 2012, Ms. Huster's case settled for $55,000.

53. Respondent agreed to take his contingency fee on $50,000 of the settlement.

54. Respondent prepared a settlement statement that stated his fees would be $16,665.00 and that $1,602.87 would be paid to Regence Blue Shield (Regence) for

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subrogation.

55. On February 10, 2012, Respondent disbursed $16,655.00 to himself as fees.

56. On June 5, 2012, Regence agreed to reduce its subrogation to $1,067.25.

57. On June 6, 2012, Respondent issued a check to Regence in the amount of $1,067.25.

58. On or about June 6, 2012, Respondent issued a check to himself in the amount of $535.62, without Ms. Huster's knowledge or permission.

59. Respondent knew or should have known that he was not entitled to the $535.62.

60. Respondent used the funds for his own benefit.

61. Respondent did not issue an accounting to Ms. Huster or otherwise inform her of the $535.62 that he had taken.

62. Ms. Huster was actually injured in that she did not receive the funds to which she was entitled until May 2016, was deceived as to the amount of funds taken by Respondent and the amount that she was entitled to receive, and was not given an opportunity to object to the handling of her settlement funds.

63. On May 2, 2016, Respondent issued a check to Ms. Huster in the amount of $535.62.

64. Ms. Huster was injured in that she did not receive the funds to which she was entitled in a timely manner.

Client DR

65. Respondent represented DR in a personal injury matter.

66. Respondent's fee agreement with DR stated that he would receive a contingency fee of 33 1/3% of the gross recovery.

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67. In February 2012, DR's case settled for $55,000.

68. Respondent prepared a settlement statement stating that his fees would be $18,331.50.

69. The settlement statement listed $8,249.35 as the amount that would be paid for medical subrogation liens. The subrogation lien was owed to The Department of Labor and Industries (L&I).

70. In October 2012, L&I agreed to reduce its lien to $4,496.39.

71. On October 19, 2012, Respondent paid L&I's reduced lien from DR's funds in trust.

72. Respondent did not disburse the $3,752.96 difference to DR until August 6, 2013.

73. Respondent knew or should have known that he was not paying the funds owed to DR in a timely manner.

74. DR was injured in that he was not paid the funds due him in a timely manner.

75. Between October 19, 2012 and August 6, 2013, Respondent failed to maintain all of DR's funds in his trust account.

76. Respondent knew or should have known that he was not treating DR's funds properly. DR was potentially injured in that his funds were not protected.

Client CR

77. Respondent represented CR in a personal injury matter.

78. Respondent's fee agreement with CR stated that he would receive a contingency fee of 33 1/3% of the gross recovery.

79. In March 2013, CR's case settled for $11,000.

80. Respondent agreed to reduce his fee to $2,000.

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81. On March 13, 2013, Respondent disbursed a check to himself for $2,000 as attorney's fees in CR's case.

82. On March 14, 2013, Respondent paid costs in the amount of $203.86 for CR's case.

83. After making these disbursements, Respondent should have had $8,796.14 of CR's funds remaining in his trust account.

84. Respondent failed to maintain CR's funds in his trust account.

85. Respondent knew or should have known that he was not treating CR's funds properly. CR was injured in that his funds were not protected.

86. On April 8, 2013, Respondent disbursed $8,751.79 to CR by check.

87. On April 8, 2013, there were insufficient funds in Respondent's trust account to cover the check to CR and, when the check was presented, the account was overdrawn.

88. On April 8, 2013, Respondent deposited $3,000 into his trust account to cover the shortage. On April 8, 2013 the check to CR was paid.

Client TJ

89. Respondent represented TJ in a personal injury matter.

90. In or around January 2013, TJ's case settled for $40,000.

91. On or around February 13, 2013, Respondent properly disbursed a total of $38,238.21 to TJ, to himself, and to others on TJ's behalf.

92. After making these disbursements, Respondent should have had $1,761.79 of TJ's funds in his trust account.

93. Between February 13, 2013 and May 2, 2013, Respondent failed to maintain the $1,761.79 balance of TJ's funds in his trust account.

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94. Respondent knew or should have known that he was not treating TJ's funds properly. TJ was potentially injured in that her funds were not protected.

95. On May 2, 2013, Respondent disbursed $1,761.79 to TJ from his personal account.

Conclusions of Law

96. Count 2 has been proven by a clear preponderance of the evidence. By converting portions of Ms. Huster's settlement funds to his own use, Respondent violated RPC 1.15A(b).

97. Count 3 has been proven by a clear preponderance of the evidence. By converting funds in Ms. Weisel's case that were due to third parties and/or Ms. Weisel without entitlement and with the intent to deprive the third parties and/or Ms. Weisel of their funds, Respondent violated RPC 8.4(b) (by committing the crime of theft in violation of RCW 9A.56.010 et seq.), RPC 1.15A(b), RPC 1.15A(f) , RPC 8.4(c) and RPC 8.4(i).

98. Count 4 has been proven by a clear preponderance of the evidence. By failing to maintain Ms. Wiesel, DR, CR and TJ's funds in trust Respondent violated RPC 1.15A(c)(1).

99. Count 5 has been proven by a clear preponderance of the evidence. By disbursing funds on behalf of Ms. Weisel that exceeded the funds that Ms. Weisel had on deposit, Respondent violated RPC 1.15A(h)(8).

100. Count 6 has been proven by a clear preponderance of the evidence. By misrepresenting to Ms. Weisel that he took no fee in her personal injury matter and that he paid $2,500 to State Farm and/or Premera, Respondent violated RPC 8.4(c).

101. Count 7 has been proven by a clear preponderance of the evidence. By failing to provide an accurate written accounting to his clients after distributing their funds held in trust in the Weisel and Huster matters, Respondent violated RPC 1.15A(e), RPC 1.4 and RPC 1.5(c)(3).

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102. Count 8 has been proven by a clear preponderance of the evidence. By failing to promptly pay clients and State Farm funds which were due to them in the DR, Huster and Weisel matters, Respondent violated RPC 1.15A(f).

C. **Counts 9-11**

103. By his Answer to the Formal Complaint, and the pre-hearing Stipulation signed by the parties, Respondent has admitted the violations contained in Counts 9-11.

Findings of Fact

104. From January 1, 2012 through August 6, 2013, Respondent failed to maintain a check register that included all transactions for his IOLTA trust account and failed to maintain a check register for his trust account with a running balance after each transaction.

105. From January 1, 2012 through August 6, 2013, Respondent failed to maintain individual client ledgers for his client trust account.

106. From January 1, 2012 through August 6, 2013, Respondent failed to reconcile his bank statements to his trust account records.

Conclusions of Law

107. Count 9 has been proven by a clear preponderance of the evidence. By failing to maintain a check register that included all transactions for his IOLTA trust account and by failing to maintain a check register for his trust account with a running balance after each transaction, Respondent's violated RPC 1.15B(a)(1)(v).

108. Count 10 has been proven by a clear preponderance of the evidence. By failing to maintain individual client ledgers for his client trust account, Respondent violated RPC 1.15B(a)(2).

109. Count 11 has been proven by a clear preponderance of the evidence. By failing to

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reconcile his bank statements to his trust account records, Respondent violated RPC 1.15A(h)(6).

D. Counts 12-15

Findings of Fact

110. Respondent represented Mr. Shrosbree in a personal injury lawsuit.

111. Mr. Shrosbree is the son of Respondent's sister, Colleen Waechter.

112. There was no fee agreement between Respondent and Mr. Shrosbree.

113. The case settled in January 2008 for $90,000.

114. At the time of the settlement, Respondent, Mr. Shrosbree and his family agreed that Respondent's fee would be $20,000.

115. Respondent accepted a fee of $20,000 for his work on the case.

116. Four years later, by letter dated May 9, 2012, Encompass Insurance advised Respondent that they were sending him $17,698.32 as an additional payment on Mr. Shrosbree's claim.

117. A few days later, Respondent received a check payable to John Shrosbree and Respondent for $17, 698.32.

118. In May 2012, Respondent explained the situation to his sister Colleen Waechter. Ms. Waechter told Respondent to keep the money.

119. In May 2012, Mr. Shrosbree was 24 years old, married and a father.

120. Because Mr. Shrosbree was using drugs at the time, Respondent and Ms. Waechter did not discuss or even consider giving the money to Mr. Shrosbree. Ms. Waechter thought her son was addicted to drugs.

121. Respondent and Ms. Waechter did not discuss or consider any other alternatives

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such as putting the funds in trust or in a restricted bank account, petitioning for a guardianship, or giving the money to Mr. Shrosbree' s wife.

122. The only subject discussed at the time was having Respondent keep the money.

123. Ms. Waechter had no authority to authorize Respondent to keep the money.

124. Ms. Waechter testified that Mr. Shrosbree signed a power of attorney in 2006 in favor of Ms. Waechter and Mr. Shrosbree's father. Mr. Shrosbree did not recall specifically signing a power of attorney to his mother and father to handle matters for the case.

125. Only an unsigned copy of a power of attorney was produced and admitted into evidence at hearing. Because the unsigned power of attorney admitted into evidence expired on June 1, 2008 and the personal injury case commenced by Mr. Shrosbree was settled before June 1, 2008, the hearing officer does not make a determination of whether the power of attorney actually existed in 2006.

126. There was no competent evidence that Ms. Waechter had an extended power of attorney from her son in 2012, when she told Respondent to keep the money from Encompass that arrived in May 2012.

127. Respondent knew that Ms. Waechter lacked authority to give him the money and knew he should advise and consult with his client, which he did not do.

128. Respondent did not inform Mr. Shrosbree of his receipt of the Encompass funds.

129. Respondent knew that the funds belonged to Mr. Shrosbree.

130. Respondent did not research whether there was a factual or legal basis for him to keep the money. Nor did he discuss the issue with any colleagues or seek professional advice.

131. On May 25, 2012, Respondent deposited the Encompass money into his trust account.

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Seattle, WA 98101-2539
(206) 727-8207

132. At the time of the deposit, Respondent forged Mr. Shrosbree's endorsement to the back of the Encompass check by copying Mr. Shrosbree's signature from another document.

133. Respondent forged Mr. Shrosbree's endorsement intentionally and knowingly, trying to make the endorsement look like Mr. Shrosbree's genuine signature.

134. Respondent signed Mr. Shrosbree's name without Mr. Shrosbree's knowledge or permission and with the intent to pass off Mr. Shrosbree's signature as genuine.

135. Respondent's forgery of the financial instrument was deliberate and intentional.

136. Respondent misrepresented to the financial institution, Commerce Bank of Washington, which held his trust account, about the bona fides of the deposit by presenting a check with the forged endorsement.

137. Between May 25 and June 6, 2012, Respondent removed the Encompass funds from his trust account without Mr. Shrosbree's knowledge or permission.

138. Respondent used the Encompass funds for his own purposes.

139. Respondent was not entitled to keep the Encompass money as an additional fee for Mr. Shrosbree's case as the case was settled four years earlier, and Respondent had accepted $20,000 as his fee on the case.

140. Respondent did not have a written fee agreement with Mr. Shrosbree or his parents. He certainly did not have an agreement calling for a higher fee four years later.

141. Respondent was not entitled to the Encompass funds.

142. Respondent knew that he was not entitled to the Encompass funds.

143. Respondent's actions were a knowing and intentional conversion of client funds.

144. Respondent converted the funds with the intent to deprive Mr. Shrosbree of the

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(206) 727-8207

funds.

145. Respondent stole and converted the funds because he needed the money and his operating accounts were short. In 2012 respondent had experienced a bad year financially. He had lost cases involving substantial advancements for the clients, which could not be recovered.

146. Respondent did not consult with Mr. Shrosbree about receipt of the money or whether he was entitled to the additional fees. He did not tell Mr. Shrosbree he had received the extra money. This nondisclosure is guilty behavior, proving that he knew that he was secretly taking and converting the client's money.

147. Respondent did not provide a written accounting to Mr. Shrosbree or otherwise inform him of the distribution of the funds.

148. Respondent acted knowingly and with the intent to hide his own misconduct.

149. Mr. Shrosbree was injured in that he was not informed of the funds and his funds were misappropriated without his knowledge.

150. After two years and four months had passed following the conversion of the funds, Respondent finally advised Mr. Shrosbree about the Encompass funds. He did so because he learned that the Office of Disciplinary Counsel was investigating the Encompass situation and respondent realized that the true facts were about to be discovered and disclosed.

151. Respondent advised Mr. Shrosbree about the funds by letter in September 2014, after the Office of Disciplinary Counsel had questioned him about the subject in a deposition.

152. On September 19, 2014, Respondent mailed a check for $17,500 payable to Mr. Shrosbree with a letter to Mr. Shrosbree stating that the money belonged to Mr. Shrosbree and not to respondent.

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153. The letter was misleading because it said that the money arrived "some time ago" and it did not disclose that the money arrived over two years earlier and had been misappropriated by the Respondent.

154. The letter was also misleading because it said, "The money is part of our share of an attorney's fee that was part of a settlement of your case." The money was not part of Respondent's fee, which had been paid six years earlier.

155. The letter correctly stated that "As a matter of law, the money is yours, not mine."

156. In sending a check for $17,500 to Mr. Shrosbree, Respondent shortchanged his client by $198.32. Respondent has provided no explanation for his failure to deliver the $198.32 to Mr. Shrosbree.

157. Respondent's conduct caused actual injury to his client.

Conclusions of Law

158. Count 12 has been proven by a clear preponderance of the evidence. By failing to inform Mr. Shrosbree of the receipt of funds from Encompass Insurance, Respondent violated RPC 1.4(a)(1), RPC 1.4(a)(3), RPC 1.4(b), and RPC 1.15A(d).

159. Count 13 has been proven by a clear preponderance of the evidence. By converting the funds received from Encompass Insurance to his own use, Respondent violated RPC 8.4(b) by committing the crime of theft in violation of RCW 9A.56.010-050, RPC 1.15A(b), RPC 8.4(c), and RPC 8.4(i).

160. Count 14 has been proven by a clear preponderance of the evidence. By signing Mr. Shrosbree's name on the Encompass Insurance check, by depositing the Encompass Insurance check into his trust account knowing that the check contained a false signature, and

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Seattle, WA 98101-2539
(206) 727-8207

by presenting the signature on the Encompass Insurance check as true knowing it to be forged, Respondent violated RPC 8.4(b) (by committing the crime of forgery in violation of RCW 9A.60.020, RPC 8.4(c), and RPC 8.4(i).

161. Count 15 has been proven by a clear preponderance of the evidence. By failing to provide a written accounting to Mr. Shrosbree after distributing the funds received from Encompass Insurance, Respondent violated RPC 1.15A(e).

E. Presumptive Sanction

162. Count 1: Respondent knowingly converted client property and committed the crime of theft. Respondent's conduct caused injury to the clients whose funds were in his trust account. The presumptive sanction is disbarment under ABA Standards 4.11 and 5.11.

163. Count 2: In the Huster matter, Respondent should have known that he was not entitled to keep the funds left over after Regence reduced its subrogation and that these funds belonged to Ms. Huster. There was actual injury to the client. The presumptive sanction under ABA Standard 4.12 is suspension.

164. Count 3: In the Weisel matter, Respondent knowingly converted funds and committed the crime of theft. State Farm was harmed in that its payment was delayed. Ms. Weisel was harmed in that she did not receive the funds that were due her until May 2016. The presumptive sanction under ABA Standards 4.12 is suspension.

165. Count 4: Respondent knew or should have known that he was not treating Ms. Wiesel, DR, CR and TJ's funds properly when he did not maintain their funds in his trust account. The clients were injured in that their funds were not protected. The presumptive sanction under ABA Standard 4.12 is suspension.

166. Count 5: Respondent knew or should have known that he was not treating Ms.

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1325 4th Avenue – Suite 600
Seattle, WA 98101-2539
(206) 727-8207

Weisel's funds properly when he disbursed funds to her that exceeded the funds that she had on deposit. There was injury to the clients whose funds were used to pay Ms. Weisel. The presumptive sanction under ABA Standard 4.12 is suspension.

167. Count 6: Respondent's conduct in misrepresenting to Ms. Weisel that he took no fee in her personal matter and that he had paid $2,500 to State Farm and Premera was knowing. Ms. Weisel was injured in that she was deceived as to the amount of fees taken by Respondent and deceived as to the amount of funds that she was entitled to receive. The presumptive sanction under ABA Standard 4.62 is suspension.

168. Count 7: Respondent knew that his accountings to Ms. Huster and Ms. Weisel were inaccurate. Both clients were injured in that they were deceived as to the amount of fees taken by Mr. Waechter, were not given an opportunity to object to the handling of their settlement funds and were deceived as to the amounts they were entitled to receive. The presumptive sanction under ABA Standard 4.62 is suspension.

169. Count 8: Respondent acted knowingly in failing to pay clients and State Farm the funds that were due them. The clients and State Farm were injured in that they were deprived of the funds they were entitled to receive in a timely manner. The presumptive sanction under ABA Standard 4.12 is suspension.

170. Counts 9-11: Respondent knew that he was failing to maintain adequate trust records and failing to reconcile his trust account. There was injury to the clients whose funds were at risk and injury to the disciplinary system when ODC was required to expend time and resources in reconstructing these accounts. The presumptive sanction under ABA Standard 4.12 is suspension. The presumptive sanction for Counts 2-11 is a two-year suspension.

171. Count 12: In failing to inform Mr. Shrosbree of the receipt of funds from

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Encompass Insurance, Respondent acted knowingly and with the intent to hide his own misconduct. Mr. Shrosbree was seriously injured in that he was not informed of the funds and his funds were misappropriated without his knowledge. The presumptive sanction under ABA Standard 4.6 is disbarment.

172. Count 13: Respondent acted knowingly in converting the funds received from Encompass Insurance to his own use and with the intent to deprive Mr. Shrosbree of his funds. The presumptive sanction under ABA Standards 4.11 and 5.11(a) is disbarment.

173. Count 14: Respondent acted knowingly in signing Mr. Shrosbree's name on the Encompass Insurance check, by depositing the Encompass Insurance check into his trust account knowing that the check contained a false signature, and by presenting the signature on the Encompass Insurance check as true knowing it to be forged. The crime of forgery involves fraud and deceit. The presumptive sanction under ABA Standards 4.11 and 5.11(a) is disbarment.

174. Count 15: Respondent acted knowingly and with the intent to hide his own misconduct in failing to provide a written accounting to Mr. Shrosbree after respondent received the funds from Encompass Insurance. Mr. Shrosbree was seriously injured in that he was not informed of the receipt of the funds, which allowed the funds to be misappropriated without his knowledge. The presumptive sanction under ABA Standard 4.6 is disbarment.

F. Aggravating and Mitigating Factors

175. The following aggravating factors set forth in Section 9.22 of the ABA Standards are applicable in this case:

(b) dishonest or selfish motive: Respondent was acting with a dishonest or selfish motive when on several occasions he took money from his trust account without entitlement and endorsed the Encompass check, deposited the money in his trust account and took the funds;

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(c) a pattern of misconduct; respondent committed multiple offenses evidencing a pattern.

(d) multiple offenses;

(i) substantial experience in the practice of law: Respondent was admitted to the practice of law in 1991.

The following mitigating factors set forth in Section 9.32 of the ABA Standards are applicable to this case:

(a) absence of a prior disciplinary record;

© Personal or emotional problems

(e) full and free disclosure to disciplinary board or cooperative attitude toward proceedings;

(g) character or reputation;

(i) mental disability

(l) remorse.

176. The hearing officer has considered Respondent's argument that he was suffering from personal or emotional problems and a mental disability (depression and vicarious traumatization) at the time of these offenses. The evidence presented on these issues was incompetent and insufficient.

177. Respondent presented the testimony of Marta Miranda, Psy. D., to testify as to whether "psychological factors could explain his poor judgment with regard to his practice as an attorney." Dr. Miranda's opinion was that "although his state of mind three years ago was not directly measured data collected in this evaluation suggests that this decisions were likely impacted by vicarious traumatization." Dr. Miranda said "vicarious traumatization is "known

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as compassion fatigue in some circles." The hearing officer found Dr. Miranda's opinions speculative and not credible .

178. Dr. Miranda first examined Respondent in December 2015. Dr. Miranda's testimony suggesting that Respondent may have suffered from vicarious traumatization in 2012 is unsupported by her 2015 examination and testing of Respondent. The various tests that she administered only address and speak to Respondent's condition in late 2015. As admitted by Dr. Miranda the tests did not determine respondent's state of mind or whether he was experiencing vicarious traumatization symptoms in 2012. On cross examination Dr. Miranda testified that respondent was aware of his ethical obligations regarding trust accounts and was aware that he should not have used trust accounts for his own expenses. Dr. Miranda also admitted on cross-examination that it was not possible for her to ascertain respondent's "state of mind at the time he breached the standards of his profession." Dr. Miranda did not have credible or persuasive opinions about Respondent's vicarious traumatization at the relevant times.

179. There was no evidence that Respondent has in the past or is now undergoing counseling or any program to address the underlying causes of his misconduct.

180. Because there was no competent or sufficient evidence that Respondent was suffering from a mental disability at any relevant time, the mitigating factor of mental disability does not apply.

181. Nor does the mitigating factor of personal or emotional problems apply on the record in this case. To the extent that Respondent had personal or emotional problems, they were caused by normal adverse professional events such as losing litigated cases, the resulting financial setbacks and his need for funds following his professional reversals. None of these

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circumstances justify conversion of client funds or Respondent's other violations of the RPC. The mitigating factor of personal or emotional problems does not apply.

182. The hearing officer has considered Respondent's argument that he made a timely good faith effort to make restitution or rectify the consequences of his misconduct. Aside from payments to the client "CR", none of Respondent's restitution efforts were made before Respondent realized the Bar Association was investigating him. Restitution to Ms. Weisel and Ms. Huster was not made until two weeks prior to the start of this hearing on May 16, 2016, even though Respondent had been aware of these issues since August 2014. This mitigating factor does not apply.

183. The mitigating factors that are present do not justify a reduction of the presumptive sanction called for by the ABA Standards.

RECOMMENDATION

184. Based on the ABA Standards and the applicable aggravating and mitigating factors, the Hearing Officer recommends that Respondent William H. Waechter be disbarred.

185. Respondent should be required to pay restitution in the following amounts:

- $198.32 to Mr. Shrosbree, plus $5,549, representing interest at the rate of 12 percent per annum on the $17,500 from May 2012 through September 2014;
- $488.53 to Ms. Weisel, representing interest at the rate of 12 percent per annum from November 2012 to May 2016 on the $1,000 wrongfully taken;
- $298.28 to Ms. Huster, representing interest at the rate of 12 percent per annum from June 2012 to May 2016 on $535.62 wrongfully taken.

Dated this 5 day of July, 2016.

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Evan L. Schwab
Hearing Officer

CERTIFICATE OF SERVICE

I certify that I caused a copy of the FOF, COL & HO's Recommendation to be delivered to the Office of Disciplinary Counsel and to be mailed to Sam Franklin, Respondent/Respondent's Counsel at 701 Pike St #1200 Seattle WA 98101, by Certified/first class mail, postage prepaid on the 6th day of July, 2016.

Clerk/Counsel to the Disciplinary Board

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FILED
AUG 11 2016
DISCIPLINARY BOARD

BEFORE THE
DISCIPLINARY BOARD
OF THE
WASHINGTON STATE BAR ASSOCIATION

In re

WILLIAM H. WAECHTER,

Lawyer (Bar No. 20602).

Proceeding No. 14#00076

ORDER GRANTING ~~RESPONDENT~~ ODC'S MOTION TO MODIFY, AMEND OR CORRECT

This matter came before the hearing officer on ODC's motion to modify, amend or correct the hearing officer's Findings of Fact, Conclusions of Law, and Recommendations filed July 6, 2016. The hearing officer finds that good cause exists to grant the motion.

It is therefore ordered that Paragraph 175 of the Findings of Fact, Conclusions of Law and Recommendation is amended to remove the factors of personal or emotional problems and mental disability from the list of applicable mitigating factors.

Dated this 8 day of August, 2016.

Evan L. Schwab,
Hearing Officer

077

CERTIFICATE OF SERVICE

I certify that I caused a copy of the Order Granting ODC's Motion to Modify, Amend or Correct
to be delivered to the Office of Disciplinary Counsel and ~~to be mailed~~
to Sam Franklin Respondent/~~Respondent's Counsel~~
at 701 Pike St #1200 Seattle WA 98101 by Certified/~~first class mail~~,
postage prepaid on the 11th day of August, 2016

Clerk/Counsel to the Disciplinary Board

RECEIVED
Lee, Smart
2017 MAR 14 AM 10: 39

FILED
MAR 10 2017
DISCIPLINARY BOARD

BEFORE THE
DISCIPLINARY BOARD
OF THE
WASHINGTON STATE BAR ASSOCIATION

In re WILLIAM H. WAECHTER, Lawyer (WSBA No. 20602)	Proceeding No. 14#00076 DISCIPLINARY BOARD ORDER ADOPTING HEARING OFFICER'S DECISION

This matter came before the Disciplinary Board at its March 3, 2017 meeting, on Respondent's appeal of Hearing Officer Evan Schwab's Findings of Fact and Conclusions of Law and Recommendation, recommending disbarment.

The Board reviews the hearing officer's finding of fact for substantial evidence. The Board reviews conclusions of law and sanction recommendations de novo. Evidence not presented to the hearing officer or panel cannot be considered by the Board. ELC 11.12(b).

Having reviewed the materials submitted, and considered the applicable case law and rules;

IT IS HEREBY ORDERED THAT the Hearing Officer's decision is adopted[1]

Dated this 3rd day of March, 2017.

Todd Startzel
Acting Disciplinary Board Chair

[1] The vote on this matter was unanimous. Those voting were Andeen, Byerly, Cornelius, Cottrell, Denton, Graber, Louvier, Myers, Patneaude and Startzel. Carney recused. Silverman, Smith and Rawlings did not participate.

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CERTIFICATE OF SERVICE

I hereby certify that I caused a copy of the Petition Objecting to the Decision

to the Office of Disciplinary Counsel and to be served

Sam Franklich

701 Pike St #1200 Seattle, WA 98101 by Certified first class mail

postage prepaid on the 10th day of March, 2017

Clerk/Counsel to the Disciplinary Board

Applicable ABA Standards for Imposing Lawyer Sanctions

4.1 ***Failure to Preserve the Client's Property***

Absent aggravating or mitigating circumstances, upon application of the factors set out in 3.0, the following sanctions are generally appropriate in cases involving the failure to preserve client property:

4.11 Disbarment is generally appropriate when a lawyer knowingly converts client property and causes injury or potential injury to a client.

4.12 Suspension is generally appropriate when a lawyer knows or should know that he is dealing improperly with client property and causes injury or potential injury to a client.

4.13 Reprimand is generally appropriate when a lawyer is negligent in dealing with client property and causes injury or potential injury to a client.

4.14 Admonition is generally appropriate when a lawyer is negligent in dealing with client property and causes little or no actual or potential injury to a client.

4.6 ***Lack of Candor***

Absent aggravating or mitigating circumstances, upon application of the factors set out in Standard 3.0, the following sanctions are generally appropriate in cases where the lawyer engages in fraud, deceit, or misrepresentation directed toward a client:

4.61 Disbarment is generally appropriate when a lawyer knowingly deceives a client with the intent to benefit the lawyer or another, and causes serious injury or potential serious injury to a client.

4.62 Suspension is generally appropriate when a lawyer knowingly deceives a client, and causes injury or potential injury to the client.

4.63 Reprimand is generally appropriate when a lawyer negligently fails to provide a client with accurate or complete information, and causes injury or potential injury to the client.

4.64 Admonition is generally appropriate when a lawyer engages in an isolated instance of negligence in failing to provide a client with accurate or complete information, and causes little or no actual or potential injury to the client.

5.1 ***Failure to Maintain Personal Integrity***

Absent aggravating or mitigating circumstances, upon application of the factors set out in Standard 3.0, the following sanctions are generally appropriate in cases involving commission of a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects, or in cases with conduct involving dishonesty, fraud, deceit, or misrepresentation:

5.11 Disbarment is generally appropriate when:

(a) a lawyer engages in serious criminal conduct, a necessary element of which includes intentional interference with the administration of justice, false swearing, misrepresentation, fraud, extortion, misappropriation, or theft; or the sale, distribution or importation of controlled substances; or the intentional killing of another; or an attempt or conspiracy or solicitation of another to commit any of these offenses; or

(b) a lawyer engages in any other intentional conduct involving dishonesty, fraud, deceit, or misrepresentation that seriously adversely reflects on the lawyer's fitness to practice.

5.12 Suspension is generally appropriate when a lawyer knowingly engages in criminal conduct which does not contain the elements listed in Standard 5.11 and that seriously adversely reflects on the lawyer's fitness to practice.

5.13 Reprimand is generally appropriate when a lawyer knowingly engages in any other conduct that involves dishonesty, fraud, deceit, or misrepresentation and that adversely reflects on the lawyer's fitness to practice law.

5.14 Admonition is generally appropriate when a lawyer engages in any other conduct that reflects adversely on the lawyer's fitness to practice law.

DECLARATION OF SERVICE

On said day below, I electronically served a true and accurate copy of the ***Brief of Appellant*** in Supreme Court Cause No. 201,645-6 to the following parties:

Sam B. Franklin
Rosemary J. Moore
Lee Smart PS Inc.
701 Pike Street, Suite 1800
Seattle, WA 98101-3929

M. Craig Bray
Washington State Bar Association
1325 Fourth Avenue, Suite 600
Seattle, WA 98101-2539

Original e-filed with:
Washington Supreme Court
Clerk's Office

I declare under penalty of perjury under the laws of the State of Washington and the United States that the foregoing is true and correct.

DATED: August 16, 2017 at Seattle, Washington.

Tammy M. Sendelback, *Legal Assistant*
Talmadge | Fitzpatrick | Tribe

TALMADGE/FITZPATRICK/TRIBE

August 16, 2017 - 11:34 AM

Transmittal Information

Filed with Court:	Supreme Court
Appellate Court Case Number:	201,645-6
Appellate Court Case Title:	In re: William H. Waechter, Attorney at Law (WSBA #20602)

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